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No. 190

IN THE

Supreme Court of the United States

October Term, 1958

TAORMINA CORPORATION, ET AL., *Petitioners*

v.

ANTONIO ESCOBEDO, *Respondent*

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	2
REPLY TO PETITIONERS' CONTENTIONS RELATING TO THE QUESTION OF LIMITATIONS	3
REPLY TO PETITIONERS' CONTENTIONS RELATING TO THE QUESTION OF LIABILITY	13
CONCLUSION	22
CERTIFICATE OF SERVICE	23

LIST OF AUTHORITIES

CASES	PAGE
Arnold v. Panhandle & Santa Fe Ry. Co., 77 S. Ct. 840	17
City of Austin v. Johnson, 195 S.W. 2d 222	17
City of Denton v. White, 179 S.W. 2d 834	17, 18
Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188	3
Fort Worth & D. C. Ry. Co. v. Prine, 211 F. 2d 697	17
Gifford v. Wichita Falls & Southern Railway Co., 224 F. 2d 374	11, 12
Gila Valley Ry. Co. v. Hall, 232 U.S. 94, 34 S. Ct. 229, 58 L. Ed. 521	19
Graver Tank & Mfg. Co. v. Linde Air Products Co., 69 S. Ct. 535, 336 U.S. 271, 93 L. Ed.—	14
Gulf, C. & S.F. R. Co. v. H. Larkin, 98 Tex. 225, 82 S.W. 1026, 1 L.R.A. (N.S.) 944, reversing 80 S.W. 94	22
Hallaway v. Thompson, Trustee, 226 S.W. 2d 816	7, 8, 10
Hawkins v. Collier, 235 S.W. 2d 528	17
Houston & T.C.P. R. Co. v. Turner, 91 S.W. 562	19
Houston Belt & Terminal Railway Co. v. Woods, 149 S.W. 372, wr. ref.	17, 20
J. H. W. Steel Co. v. Dover, 170 S.W. 809	21
Johnny Lopez v. Brown Ely, 302 S.W. 2d 957	17
Lang v. Henderson, 147 Tex. 353, 215 S.W. 2d 585	15
M. K. T. R. Co. v. Barnaby, 167 S.W. 2d 235, ref. w.m.	19
Nesmith v. Magnolia Petroleum Co., 82 S.W. 2d 721	20, 21
O'Quinn v. Scott, 251 S.W. 2d 168, wr. ref.	4, 5, 6, 7, 10
Peck v. Peck (Tex. Sup.), 87 S.W. 248	17, 19
Pope v. St. Louis, S.W. Ry. Co., 155 S.W. 1175	21
Sanders v. Leech, 158 F. 2d 486	14
Santa Fe Tie & Lumber Preserving Co. v. Collins, 198 S.W. 164, wr. ref.	21
Sternenberg v. Marshall, 257 S.W. 2d 312, ref., n r.e.	17
Texas & P. Ry. Co. v. Brown, 168 S.W. 866	20
United States v. Hill Lines, Inc., 175 F. 2d 770	14
West v. Johnson, 129 S.W. 2d 811, wr. ref.	10
Wilkerson v. McCarthy, 69 S. Ct. 413, 336 U.S. 53	15

FEDERAL RULES OF CIVIL PROCEDURE	
Rule 15-c	3, 8
Rule 52-a	13

REVISED CIVIL STATUTES OF TEXAS	
Article 5526	3
Article 5539-b	3, 8, 9

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Respondent, Antonio Escobedo, prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied, and in opposition to such Petition, files this, the Respondent's Brief in accordance with Rule 24 of the Supreme Court of the United States.

Statement of the Case

The United States District Court for the Southern District of Texas, Brownsville Division, rendered judgment for the Respondent herein against the Petitioners, A. F. Taormina, E. A. Taormina and Frank Culicchia, and Taormina Company, a partnership, in the sum of $20,000.00 (R. 476).

This is a master-servant case. Escobedo, the Respondent, was an employee of the Taormina Company partnership at the time of his injuries on or about May 17, 1952, and was working as a farm laborer on the Taormina farm south of Donna in Hildalgo County, Texas. The injuries which were the subject of his suit were sustained by him when a gasoline fire occurred while the Respondent was pumping gasoline from a 55-gallon drum into a tractor belonging to the Petitioners, using equipment furnished by the Petitioners (R. 467). The trial Court, hearing the case after a jury was waived, rendered judgment for the Respondent after finding the facts as follows (R. 467-473):

(1) That the Petitioners were negligent and that their negligence proximately caused Respondent's injuries.

(2) That the Respondent was not guilty of any contributory negligence, and that no contributory negligence on his part was a proximate cause of his injuries.

(3) That the Respondent was not barred from recovery by an application of the doctrine of assumed risk.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the trial Court (254 F. 2d 171), and denied Petitioners' motion for rehearing.

Reply to Petitioners' Contentions Relating to the Question of Limitations

Insofar as the Petition for Writ of Certiorari seeks a review of the action of the Fifth Circuit Court of Appeals on the question of the Texas statute of limitations is concerned, the writ should not be granted because:

(1) Under the laws of Texas, a plea of limitations would not avail the Petitioners, and the Texas Courts would reach the same result as the Fifth Circuit Court of Appeals has reached in the case at bar on this question; therefore, it is immaterial whether or not the doctrine of *Erie Railroad Company v. Tompkins* (304 U.S. 64; 58 Sup. Ct. 817; 82 L. Ed. 1188) controls the filing of amended pleadings where State statutes of limitations are concerned;

(2) The Texas rule on relation-back of amendments (Article 5539-b of the *Revised Civil Statutes of Texas*, quoted on page 5 of the Petitioners' Petition) is substantially the same in its application as Rule 15-c of the *Federal Rules of Civil Procedure* (quoted on page 6 of Petitioners' Petition); and therefore, it is immaterial whether the State rule or the Federal rule is controlling;

(3) Both the Texas Courts and the Federal Courts have arrived at the same conclusion and permit the filing of amendments to correct misnomers or to change the capacity in which a party has been sued without letting in a plea of limitation.

That portion of Petitioners' petition for writ of certiorari dealing with the Texas statute of limitations (Article 5526 of the *Revised Civil Statutes of Texas*) is apparently largely concerned with the supposition that the Texas

rules relating to amendment of pleadings would have given Petitioners a valid plea of limitation, and that there is some conflict between the Federal rules and the Texas rules in this regard. Such is not the case, and the opinion of the Fifth Circuit Court of Appeals is supported by recent holdings of the Texas Court.

The opinion of the Fifth Circuit Court of Appeals correctly sets out the various events leading up to the Petitioners' plea of limitations, and points out, among other things, that after suit had been filed, before the running of the statutes of limitations, against E. A. Taormina, A. F. Taormina and Frank Culicchia, and against Taormina Corporation, a Texas corporation, and Taormina Corporation, a Delaware corporation, that the Petitioners did not disclose the true facts (that the farm was being operated by a family partnership), and

> "disclosure was studiously avoided." (Page 5 of Appendix to Petition for writ of Certiorari).

The Petitioners admit that there is a trend towards liberality in pleading, but then rely upon a series of old Texas authorities in support of their argument to the effect that a Texas Court would have found differently in the present case.

One of the most recent Texas cases on the subject, decided in 1952, is *O'Quinn v. Scott*, (251 S.W. 2d 168, wr. ref. As correctly stated by the Petitioners on page 34 of their Petition, Rule 483 of the *Texas Rules of Civil Procedure* provides that after the date of adoption of such Rule in 1941, the docket notation, "refused", is a determination that the principles of law declared in the

opinion of the Court of Civil Appeals are correctly determined and that the judgment is a correct one). In the *O'Quinn* case, the cause of action had arisen on October 18, 1947. On October 17, 1949, one day prior to the running of the statute of limitations, the plaintiff sued three named individuals alleging that they were partners in a construction business operating under the firm name of W. W. Scott Construction Company, and that the injuries had been sustained as a proximate result of negligence in the construction work. On November 3, 1949, the Defendants filed a joint answer to the original petition denying under oath that they were engaged in the construction business as a partnership under the name of W. W. Scott Construction Company at the times and places mentioned in the plaintiff's petition, or that they were engaged as individuals in such construction work. (This is very similar to the case at bar in which the Fifth Circuit Court of Appeals has found that the true interests were not disclosed and disclosure was studiously avoided). On March 2, 1950, almost six months after the statute of limitations would have run, the appellants filed a First Amended Petition naming W. W. Scott Construction Company, a corporation, as an additional defendant. The plaintiff pleaded in the alternative that if the three individuals named were not partners, then the defendant corporation was responsible for the work, and in the further alternative, that if the corporation no longer existed, then that the three named individuals, as officers, were the liquidating trustees of the corporation. (These allegations are almost identical to the allegations of the Respondent in the case at bar in the second paragraph of his Second Amended Original Petition. R. 39).

The corporation in the *O'Quinn* case filed an answer containing, among other things, a plea of limitations. They moved for summary judgment on affidavits setting out that they were not partners on the date in question, but that the corporation was doing the construction work and had since been dissolved. The motion for summary judgment was granted, and in reversing and remanding the case, the Waco Court of Civil Appeals said:

> "The cause of action alleged in their first amended petition was based upon the same transaction and occurrence set forth in their original petition. The only new or different facts alleged in the amended petition related to whether W. W. Scott Construction Company was a partnership or a corporation at the time when the cause of action declared upon arose . . . Did these new facts or grounds of alleged liability let in a valid plea of limitation on behalf of the dissolved corporation or its trustees in liquidation at the time when the amended petition was filed?
>
> ". . .
>
> "The purpose of the statutes of limitation is not to permit debtors to escape their just obligations but is rather to prevent demands originally invalid or which had been discharged from being enforced after such a lapse of time as would probably make it impossible for defendants to procure the evidence by which a just defense could be established.' (Citing many cases.) Furthermore, *it is generally held that the filing of an amended petition, which merely changes the capacity in which a defendant was originally sued, does not constitute the commencement of a new suit so as to allow limitation to run until the time when the amended petition was filed.* 54 C.J.S., Limitations of Actions, Sec. 275, pg. 308, et seq.; 34 *Am. Jur.*, pg. 225, Sec. 227; 28 *Tex. Jur.*, pg. 207, et seq., Sec. 114.
>
> ". . .

> "Under the circumstances shown by the record before us, we have concluded that the filing of Appellant's amended petition on March 2, 1950, did not let in a valid plea of limitation on behalf of the dissolved corporation or its statutory trustees in liquidation. We think our conclusion is in harmony with the holding of the Supreme Court in the recent case of Hallaway vs. Thompson, Trustee, 148 Tex. 471, 226 S.W. 2d 816." (Emphasis added).

It will be readily seen that the *O'Quinn* case is virtually on all fours with the case at bar, and Petitioners' attempt to distinguish such case in their Petition is without merit. The Fifth Circuit Court of Appeals correctly held that under the authority of the *O'Quinn* case, the Texas Courts would reach the same result in the case at bar. In the *O'Quinn* case, the plaintiff had sued a partnership which turned out to be a dissolved corporation. He was permitted to amend and avoid a plea of limitation on the part of the corporation. In the case at bar, the Respondent originally sued a dissolved corporation which turned out to be a partnership, and the Court permitted Respondent to amend and overruled the partnership's plea of limitation.

The *O'Quinn* case cites the opinion of the Texas Supreme Court in *Hallaway v. Thompson, Trustee* (226 S.W. 2d 816). On page 30 of their Petition, the Petitioners cite this case, and make some erroneous statements which do not appear in the Record as to unreported conversations between counsel and the trial Court in regard to this particular authority. Respondent does not believe that this type of argument has any place in the Petition, but says that *Hallaway v. Thompson, Trustee*, is in point in

the case at bar. This case applies Article 5539-b of the *Revised Civil Statutes of Texas* in exactly the same manner that the Federal Courts apply Federal Rule 15-c. In the *Hallaway* case, the plaintiff sued Guy A. Thompson, Trustee for the St. Louis, Brownsville & Mexico Railway Company, and alleged that he was an employee of that defendant at the time of the injury. Subsequently, after the running of both the 2-year Texas statute of limitations and the Federal 3-year statute (45 U.S.C.A. Sec. 56), the plaintiff amended and sued the defendant trustee in his capacity as Trustee for the San Antonio, Uvalde & Gulf Railroad Company. On page 820 of its opinion, the Texas Supreme Court said:

> "There seems to be no decision construing Article 5539-b on the point presented by this case, and we must therefore pass on its application as an original proposition. The record in this case shows that the same man, Guy A. Thompson, was named as the defendant, and the same transaction or occurrence was alleged as a basis for the suit, in all of the plaintiff's pleadings. The material change as between the original petition and the second amended original petition is that the capacity in which the defendant is sued is changed. . . .
>
> ". . .
>
> "We think that the purpose of the statutes of limitations, as amended by Article 5539-b, would be given proper effect by holding that in the present case, the plaintiff's action was commenced with the filing of his original petition. The defendant, Guy A. Thompson, was then notified of the nature of the plaintiff's claim and the occurrence or transaction out of which it arose. He and his counsel, who have represented him throughout this litigation in whichever capacity he

> was sued, were then given timely opportunity to interview witnesses and to obtain such evidence as they deemed advisable to defend the suit. . . . It was peculiarly within the defendant's knowledge as to whether he was employing the plaintiff as Trustee for one railroad or the other at the time of the injury. . . . Under these conditions, we think it would be a misapplication of the statutes of limitation to hold that the plaintiff's action was barred."

The Texas Supreme Court then proceeded to distinguish many earlier decisions which would seem to hold to the contrary, and in effect, overruled certain old cases which would seem to be in conflict, saying that the obvious purpose of Article 5539-b was to

> "modify the previously existing rule for determining whether limitation should apply to an amended pleading. . . ."

The Petitioners further state in their Petition at page 35 that the holding of the Fifth Circuit Court of Appeals on the matter of limitations is in conflict with other Federal decisions. They then cite a series of cases for

> "the general rule that the statute of limitations continues to run in favor of third parties brought in by amendment as parties-defendant until they are actually made parties."

The key to the fallacy in Petitioners' argument is contained in their use of the expression, "third parties". The many cases which Petitioners cite are cases in which the new defendants brought in after the statute of limitations had

expired were truly "third parties", as opposed to parties to the action before the statute ran.

There is no doubt that as to true third parties or strangers, the statute of limitations is not tolled by the filing of an original petition in which third parties are not named. Such was the case in *West v. Johnson* (129 S.W. 2d 811, wr. ref.), which is heavily relied on by the Petitioners, but which has no application to the facts in the case at bar. In this case (decided before *Hallaway v. Thompson* by the Supreme Court or *O'Quinn v. Scott*), the plaintiff sued one corporation claiming that she had been injured in a parking lot belonging to it. At the time of trial, after the statute of limitations had expired, it developed that the parking lot belonged to an entirely different corporation with a name that was in no way similar to the corporation sued. It also developed that a corporation with a name similar to the one originally sued had once owned the lot, but had conveyed it to still another corporation by a recorded deed some years before the accident occurred. The only connection between the owner of the lot and the corporation which had formerly owned the property was that a man named Berry was the agent of both of them. The Court said that service on Berry would not have the effect to bind other corporations,

> "that Berry may have chanced to represent as an agent, when they were in no way involved in the litigation shown by the process served on him."

This case is not applicable to the facts in the case at bar where all of the Taormina organizations have similar names, are composed of the same people and bear a relationship

to each other that was peculiarly within their own knowledge. The Petitioners do not even question the fact that judgment was properly rendered against the three individuals who were originally sued and served and who were members of the partnership against whom judgment was also ultimately rendered.

In the case of *Gifford v. Wichita Falls & Southern Railway Co.* (224 F. 2d 374), by the Fifth Circuit Court of Appeals, the Wichita Falls & Southern Railroad Company had acquired all of the assets of the Wichita Falls & Southern Railway Company some years prior to the institution of the suit. The Court said that the two corporations were affiliated in a manner known primarily to themselves and their owners. The plaintiff sued the Railway Company by mistake, and only after the case had been once tried out did the defendant divulge, just before the second trial and after the limitation period had run, that the defendant had been misnamed. In deciding the case, the Fifth Circuit Court said that the defendant should not be permitted,

> "just before the second trial begins, to say: 'You are suing the wrong person; you should have sued my Siamese sister,' . . . Where intercorporate relations exist in cases such as this, all such corporations are held to a higher degree of frank disclosure of mistakes such as was made in this case, than is required in other cases where no such close relation exists."

In the case at bar, the interrelation of Taormina Corporation, a Texas corporation, Taormina Corporation, a Delaware corporation, Taormina Company, a partnership, and the various members of the Taormina family can be

seen, by an examination of paragraphs 1 through 4 of Plaintiff's Second Amended Original Complaint (R. 39-45), as well as by the Court's Memorandum on Consolidated Motions (R. 65-74). Certain of the facts are additionally shown in various motions, answers and replies which were omitted from the printed record by the Petitioners in their Designation of the Record with the statement that,

> "The Appellants do not assign any error to the Court's action in regard to these particular defendants";

and,

> "The Appellants are not assigning any error to any action of the Court regarding these corporations". (R. 4, 5)

In the case at bar, as in the *Gifford* case, supra, the Petitioners concealed the relation between them from their uneducated and ignorant employee who only knew that he was employed by "Taormina", and the Fifth Circuit Court of Appeals said:

> "We do not say that the partnership was required to make any disclosures, but it should not be permitted to benefit by not having done so. It was the entity by whom he was employed, against which he had and intended to assert a claim. Those who had the liability had notice of the suit. The Appellee was entitled to the benefits of the rule, the second amendment was properly allowed, and the Appellants were properly made Defendants by the amendment." (Pages 5, 6 of the Appendix to Petitioners' Petition for Writ of Certiorari.)

Reply to Petitioners' Contentions Relating to the Question of Liability

That portion of the Petition for Writ of Certiorari dealing with the questions of negligence, contributory negligence and assumed risk overlooks the most salient aspect of this case in the present state of the record, which is that since a jury was waived, the findings of fact of the trial Court, unless clearly erroneous, could not be set aside by the Fifth Circuit Court of Appeals, and the Fifth Circuit Court of Appeals has specifically found, in its opinion affirming the trial Court judgment, that:

> "We need not enlarge upon the recital of the evidence before the Court. It is enough to say that there was ample evidence to sustain the Court's finding that the Appellants were negligent and that their negligence was the cause of the Appellee's injuries. The evidence justifies the Court's conclusion that there was no contributory negligence of the Appellee which barred recovery." (Page 8 of Appendix to the Petition for Writ of Certiorari.)

The Fifth Circuit Court therefore concurred in the findings of the trial Court and affirmed the same, as they were required to do under Rule 52-a of the *Federal Rules of Civil Procedure* providing, in part, that,

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Both the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have many

times applied Rule 52-a, and have held that findings of fact made by trial Courts without the aid of a jury will not be set aside if the evidence is conflicting. Some Fifth Circuit cases on this point are *Sanders v. Leech* (158 F. 2d 486); *United States v. Hill Lines, Inc.* (175 F. 2d 770), holding the Court's finding of fact that there was no contributory negligence was not "clearly erroneous" and would not, therefore, be set aside; and *Scott v. Gearner* (197 F. 2d 93).

In view of the statement above copied from the opinion of the Fifth Circuit Court of Appeals in the case at bar, there is no merit in the statement at page 42 of the Petition for Writ of Certiorari to the effect that the Court of Appeals did not act on the findings of fact of the trial Court.

Despite the fact that both the trial Court and the Circuit Court of Appeals have concurred in the findings of fact which are determinative of this case, the major portion of the Petition for Writ of Certiorari consists of arguments upon the weight of the evidence. Arguments on the weight of conflicting evidence to support concurring findings of fact by a District Court and a Circuit Court of Appeals are not proper on application for writ of certiorari, it having been many times held by the United States Supreme Court that the Supreme Court is a court of law rather than a court for correction of errors in fact findings, and it cannot undertake to review concurring findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co. v. Linde Air Products Co.* (69 S. Ct. 535, 336 U.S. 271, 93 L. Ed.—).

It has also been many times held by the Supreme Court of the United States, as well as the Supreme Court of Texas, that the issues of negligence and contributory negligence, where reasonable minds can differ, are matters to be resolved by the trier of the facts, (in this instance, since a jury was waived, the trial Court). *Wilkerson v. McCarthy* (69 S. Ct. 413, 336 U.S. 53); *Lang v. Henderson* (147 Tex. 353, 215 S.W. 2d 585).

The only question, therefore, remaining to be determined is whether or not the concurrent findings of fact by the two Courts below are "clearly erroneous" or "show very obvious and exceptional error".

Reducing Petitioners' argument to one sentence, they claim, in effect, that since gasoline is a highly dangerous substance, and since the Respondent was alone at the time of his injuries, and since the Respondent had previously noticed that the hose in question was not clamped with a metal clamp to the gasoline pump, that it must follow, as a matter of law, that the Petitioners were not negligent and that the Respondent was contributorily negligent and assumed the risk of his employment. An examination of the record in the case and the detailed findings of fact by District Judge Allred (R. 467), show clearly that the trial Court's findings of fact on negligence, contributory negligence and assumed risk were well supported in the record. Petitioners would have this Court believe that Respondent was a skilled workman and an experienced mechanic. The trial judge, who had the opportunity to observe this witness and hear his testimony, found:

> " . . . he was hired to hoe beets three or four weeks prior to his injury. He did not speak English and had not completed the third grade in Mexican schools.

He had no technical training other than about three years as a mechanic's helper on automobiles—not tractors—in Mexico." (R. 469).

"He was neither the skilled or experienced mechanic, nor the intelligent person, that defendants picture him. He is little more than the typical wetback laborer common to the border in recent years." (R. 473).

The Petition for Writ of Certiorari recognizes the fact that the undisputed evidence showed that the pump in question, with which Respondent was provided by the Petitioners, was defective in that the hose was not clamped to the pump nozzle. The absence of the metal clamp in question was known to Petitioners' vice-principal and farm foreman for a long time prior to the accident (R. 380, 381, 384, 385, 440, 470). Respondent had never performed the type of work in question alone before the day of the accident (R. 389). The only instructions that were given to him by his employers was to leave the motor of the tractor running at all times while gasoline was being put into it to keep from losing the prime on the pump (R. 386-387).

For the purpose of illumination on the night in question, the Respondent was provided by his employers only with an ordinary, old-fashioned, coal oil lantern with a glass hood (R. 388, 390). All of the equipment in question (with the exception of the lantern) was put in place by Domingo Cavazos, the Petitioner's vice principal (R. 379, 439). At the time of the accident, Respondent was performing his work at around midnight (R. 377) at a location some 440 yards or almost a quarter of a mile from the ranch house (R. 376). He was alone and had not been provided with a helper or fellow employee (R. 378), although the trial Court found, and the evidence supports

the finding, that generally more than one employee was assigned to this particular task (R. 143, 193, 431, 433, 440, 471).

The portions of the Record referred to above clearly show that under the familiar rules in master and servant cases, from the Texas Courts and from practically every other American jurisdiction, support the trial Court's finding that the Petitioners were negligent in various respects:

(1) In providing the employee with defective equipment:

Peck v. Peck by the Texas Supreme Court (87 S.W. 248);
Sternenberg v. Marshall (257 S.W. 2d 312, ref. n.r.e.).

(2) In failing to provide Respondent with a safe place to work:

City of Austin v. Johnson (195 S.W. 2d 222);
City of Denton v. White (179 S.W. 2d 834);
Arnold v. Panhandle & Santa Fe Ry. Co. (77 S. Ct. 840, reversing a decision of the Texas Court of Civil Appeals for the 7th Supreme Judicial District);
Houston Belt & Terminal Railway Co. v. Woods (149 S.W. 372, wr. ref.).

(3) In failing to give the Respondent adequate warnings and instructions:

Johnny Lopez v. Brown Ely. (302 S.W. 2d 957);
Fort Worth & D. Ry. Co. v. Prine (211 F. 2d 697);
Hawkins v. Collier, a case involving the explosion of gasoline and the employer's failure to instruct in its use (235 S.W. 2d 528).

(4) In failing to provide the Respondent with a fellow worker to assist in the operation:

City of Denton v. White (179 S.W. 2d 834, wr. ref. w.m.).

On the question of contributory negligence and assumption of risk, the most important single finding of the trial Court was to the effect that although the Respondent testified that he had noticed that the clamp in question was missing from the pump prior to the accident, that

> " . . . he did not know or appreciate the fact that it endangered his safety before he was injured; . . . (R. 473).

The trial Court further found that an ordinarily prudent person under the same circumstances would not have appreciated the danger, and that the trial Court was

> "certain he did not, and could not, under all the circumstances, appreciate the danger." (R. 473).

These findings are clearly supported in the evidence in that Respondent testified that prior to the time of the accident, he did not know how these pumps were constructed and did not know that there was any danger that this pump was going to come loose (R. 188), and he did not know whether the pump was supposed to have a clamp on it or not (R. 187); that without the clamp on it, the pump worked—"it *pumpted* the gasoline" (R. 185-186), and the hose came off of the connection suddenly, and the gasoline had not been dripping or leaking before it came completely loose (R. 193-194).

Both the Supreme Court of the United States and the Supreme Court of Texas agree that the doctrine of assumed risk is not applicable to risks created by an employer's negligence, and further, that even if an employee observes a defect, it must appear, before he can be said to have assumed the risk, that he knows that the defect is a defect and endangers his safety. *Gila Valley Ry. Co. v. Hall* (232 U.S. 94, 34 S. Ct. 229, 58 L. Ed. 521); *Missouri, K. T. R. Co. v. Barnaby* (167 S.W. 2d 235, ref. w.m.); *Peck v. Peck*, supra; *City of Austin v. Johnson*, supra; *Houston & T.C.P. R. Co. v. Turner* (91 S.W. 562).

If, therefore, the Respondent could not have appreciated the danger or anticipated the injury, and an ordinary prudent person, *under the same circumstances*, could not have done so, it is clear that the Respondent was likewise not guilty of contributory negligence and that no contributory negligence on his part proximately caused his injury, as both the trial Court and the Fifth Circuit Court of Appeals have found.

What, then, of Petitioners' argument that simply because the Respondent happened to be alone at the time of his injuries, and is charged with knowledge of the dangerous nature of gasoline, that he is barred, as a matter of law, from a recovery? This was the exact situation in *Houston Belt & Terminal Railway Co. v. Woods* (149 S.W. 372, wr. ref.), where the employee was provided by his employer with a lantern to use for light in filling one of the employer's engines with oil. He set the lantern down only a few feet away from the pipe through which the oil was running into the engine, and was killed in a resulting explosion, but the Court held that the plaintiff was not contributorily negligent as a matter of law if

he acted as an ordinary prudent person in his situation would have done under the same or similar circumstances; and in *Texas & P. Ry. Co. v. Brown* (168 S.W. 866), it was likewise held that an employee was not contributorily negligent as a matter of law for holding his lantern within 3½ to 4 feet of a fellow employee to give light for the fellow employee to fill his own lantern with oil.

It must be remembered that the lantern in the case at bar could have constituted no hazard in the absence of the splattering of gasoline from the broken pump connection. All of the Taormina employees used the same type of lantern in the same operation without being injured for a long period of time prior to Respondent's injuries (R. 189).

The Petitioners rely heavily on the case of *Nesmith v. Magnolia Petroleum Co.* (82 S.W. 2d 721, no writ history), but this case is not a master and servant case, and the Court specifically held:

> "The doctrine of assumed risk applies only to the relation of master and servant."

Furthermore, in the *Nesmith* case, the pump which was provided by the petroleum company to its customer had no nozzle on the hose, and the hose was too large to be inserted into the gasoline tank without the nozzle. The Court said that the plaintiffs knew how to operate the pump and knew that they were running a risk of spilling gasoline when they used it; they knew that the absence of the nozzle constituted a defect because they had already complained to the petroleum company which had promised to send them a nozzle, but the customer proceeded to use

the defective pump before the nozzle arrived. This case does not reveal a situation in any way comparable to the circumstances in the case at bar.

The Petitioners finally attempt to lift out of context a quotation from the *Nesmith* case to the effect that the pump "was a simple device", and from this language, draw the conclusion that in the case at bar, the "simple tool doctrine" should be applied. The simple tool doctrine applies only to master and servant cases, and as stated before, the *Nesmith* case was not a master-servant suit. Furthermore, the trial Court in the case at bar has specifically found, in regard to the pump in question, that

> "clearly it was defective and constituted more than a simple tool." (R. 470).

Since the trial Court has made this finding, and the same has been concurred in by the Fifth Circuit Court, it is binding upon the Petitioners because in Texas the question of whether or not a tool is a simple tool is considered a question of fact to be determined by the trier of the facts.

In the case of *Pope v. St. Louis, S.W. Ry. Co.* (155 S.W. 1175), the Texas Supreme Court held that even a chisel was not a simple tool as a matter of law, and that the determination of the question should be left to the jury. We also cite *Santa Fe Tie & Lumber Preserving Co. v. Collins* (198 S.W. 164, wr. ref.), in which a jury verdict for plaintiff was affirmed against the contention that a sledge hammer was a simple tool as a matter of law, which the defendant was not required to inspect. In *J. H. W. Steel Co. v. Dover* (170 S.W. 809), the Court cited

the *Pope* case in support of its holding that a pair of tongs was not as a matter of law a simple tool, and in *Henwood v. Neal* (198 S.W. 2d 125), the tool in question was a pick, but the employee-plaintiff was permitted to recovery on a jury verdict finding the employer negligent in failing to inspect.

In addition, the simple tool doctrine is not applicable in the case at bar because such doctrine only operates to relieve a master of the duty to inspect certain simple tools which have been committed to the custody of a servant who has the capacity to understand its character and uses. *Gulf C. & S.F. R. Co. v. H. Larkin* (98 Tex. 225, 82 S.W. 1026, 1 L.R.A. (N.S.) 944, reversing 80 S.W. 94). In the case at bar, the trial Court did not find the Petitioners guilty of any negligence for failure to inspect, but, on the contrary, found that the defects in question were known to the Petitioners' vice principal Cavazos and had been for a long time (R. 470).

Conclusion

Respondent respectfully submits that this Honorable Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit because the trial Court and the Fifth Circuit Court of Appeals have correctly held that judgment should have been rendered against all of the Petitioners herein, and the holding of such Courts is in conformity with both the Texas rules and the Federal rules relating to amendments of pleadings; and the trial Court and the Fifth Circuit Court of Appeals have concurred in findings of fact which are not clearly erroneous but which are supported by the

evidence, and such findings of fact establish liability on the part of the Petitioners and should not now be reviewed.

Respectfully submitted,

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Certificate of Service

The State of Texas :

County of Cameron :

I, LEONA HAND, upon oath state that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was by me on the 14th day of AUGUST, 1958, personally deposited in the United States Post Office at Harlingen, Texas, with first class postage prepaid, addressed to Mr. Jackson Littleton, Kelley, Looney, McLean & Littleton, Attorneys at Law, Edinburg, Texas, and to Strickland, Wilkins, Hall & Mills, Attorneys at Law, Mission, Texas, all attorneys for the Petitioners; and I further certify that

airmail postage was not required because the attorneys in question reside less than 500 miles from Harlingen, Texas.

Leona Hand

Subscribed and sworn to before me by the said LEONA HAND on this 14th day of AUGUST, 1958.

Mary Wark

Notary Public in and for Cameron County, Texas. (My commission expires June 1, 1959, and I am authorized under the laws of Texas to administer oaths).